

COMPLIANCE BOARD OPINION NO. 00-14

December 8, 2000

Dwight H. Sullivan, Esquire
ACLU of Maryland

The Open Meetings Compliance Board has considered the complaint you filed on behalf of Ms. Parris Lane alleging that the Annapolis City Council violated the Open Meetings Act by discussing legislative findings during a closed meeting on June 6, 2000. For the reasons stated below, we find that no violation occurred.

I

Background

On March 13, 2000, the Annapolis City Council enacted an ordinance that allowed the Council to establish “drug-loitering free zones” in the City following a request by a qualifying property owner or resident or by a community association and confirmation by the Chief of Police that at least three drug arrests have occurred in the proposed zone during the 24-month period prior to the petition.¹ Ordinance No. 0-7-2000. If the Council passed a resolution establishing a drug-loitering free zone, the City would post signs identifying the zone. The designation would remain in effect for 24 months unless renewed in accordance with the procedures in the ordinance.

The ordinance makes it a misdemeanor for a person who is loitering in a “public place” to disobey the order of a police officer to move on under enumerated circumstances. Under the ordinance, a police officer may require a person who is loitering in a posted zone to move on if the officer had received information from a reliable source that the person was engaged in a “drug-related activity,” the person is a “known unlawful drug user, possessor, seller, or buyer” who is subject to a court order prohibiting the person’s presence in a high drug activity geographic area, or the person was behaving in a certain manner suggesting that the person is engaged

¹ The factual background is developed from your complaint, the response of the City, and follow-up correspondence, along with various attachments submitted to the Compliance Board by each party.

in “drug-related activity” by demonstrating certain behaviors.² A person convicted of violating the ordinance may be imprisoned for up to six months, fined up to \$1,000, or both.

In February, prior to final enactment of the Drug-Loitering Free Zones ordinance, the complainant and others filed a lawsuit in the Circuit Court for Anne Arundel County, challenging the constitutionality of the ordinance. The suit was subsequently removed to the United States District Court for the District of Maryland. *NAACP Anne Arundel County Branch, et al. v. City of Annapolis*, U.S. District Court Civil No. CCB-00-CV-771.

On June 5, 2000, the day before a regular meeting of the City Council, the City Attorney requested a meeting with the Council concerning discovery requests and other matters related to the pending litigation. This closed meeting, the subject of the complaint, occurred on June 6, 2000, prior to a regular public meeting of the Council. The Council relied on §10-508(a)(8) of the State Government Article,³ authorizing a public body to meet in closed session to “consult with staff, consultants, or other individuals about pending or potential litigation.”⁴ The closed meeting lasted approximately seven minutes. At the regular public meeting that followed, after comments by several Council members, the Council by a 4 to 3 vote adopted legislative findings in support of the ordinance that it had enacted 12 weeks earlier.⁵

² “Drug-related activity,” “known unlawful drug user, possessor, seller, or buyer,” and “public place” are terms defined in the ordinance.

³ All statutory references are to the State Government Article, Annotated Code of Maryland.

⁴ The minutes of the closed meeting cite “Section 10-508(a)(1)(i)” as the authority for closing; the topic was to “discuss *NAACP Anne Arundel County Branch, et al v. City of Annapolis, et al*” The citation is obviously erroneous. The description of the meeting in those minutes makes clear that the purpose of the meeting was to discuss the pending litigation. Furthermore, both the Council’s response and the minutes of the next regular meeting cite §10-508(a)(8).

⁵ Apparently, the City Attorney had prepared the legislative findings for the Council’s consideration prior to the June 6th meetings, based on information acquired during the development of the ordinance enacted March 13th.

II

Complaint and Response

Your complaint alleged that the Annapolis City Council violated the Open Meetings Act by discussing proposed legislative findings during the meeting, June 6, 2000, that was closed under §10-508(a)(8), allowing a public body to meet in closed session with its counsel or others concerning pending or potential litigation. You also alleged a violation of §10-505, requiring that “[e]xcept as otherwise provided [in the Open Meetings Act,] a public body shall meet in open session.” In essence, your position is that in the closed meeting, the Council’s discussions impermissibly extended beyond the limited scope of the litigation exception and included the legislative findings supporting the Drug-Loitering Free Zone ordinance.⁶ In support of your allegations, you cited a statement made by the Mayor of Annapolis at a public meeting later that evening, prior to adoption of the legislative findings: “Mr. City Attorney, ... since you brought it up and *it was the subject of our closed meeting earlier this evening*, I would entertain a motion to adopt the proposed statement of legislative findings ...” (emphasis in original).

In a timely response on behalf of the Council, Ms. Karen P. Ruff, Assistant City Attorney for the City of Annapolis, denied that the closed meeting included discussion of “the substance of [the] proposed legislative findings.” According to Ms. Ruff, “any mention of proposed legislative findings was clearly incidental to Council’s right to consult with the City Attorney about pending litigation involving a prior legislative enactment” In support of its position, the Council relied in part on the Council members’ debate on the legislative findings during a public meeting that followed the closed meeting as well as the limited duration of the closed meeting with the City Attorney. As for the Mayor’s comment, Ms. Ruff suggested that it “merely references the fact that the City Attorney had requested the closed meeting to consult with his client about the *NAACP* lawsuit.”

In a reply to the Council’s answer, you submitted a letter referring to Council members’ statements concerning the closed meeting, as reported in two newspapers. Concerning any incidental discussion of the legislative findings during the closed meeting, you indicated that “[a]dopting legislative findings is a legislative act; it does not directly relate to the pending litigation.” As for the limited duration of the closed meeting, you noted that the public debate on the legislative findings was even shorter. On receipt of your second letter, the Compliance Board offered the Council an opportunity to respond. In its supplemental response, the Council questioned the

⁶ In your original complaint, you also alleged two procedural violations. However, in your supplemental response, you withdrew these allegations. Therefore, our focus is on the scope of the litigation exception rather than the procedural questions raised in your initial complaint.

evidentiary weight that might be placed on the newspaper quotations. The Council also addressed the connection of legislative findings to constitutional challenges similar to the litigation at issue. Without compromising the justification for conducting the closed meeting, the Council “[relied] on the logical and rational inferences that should be drawn in light of the totality of the reported proceedings in the open session.”

III

Analysis

Unless otherwise provided under the Open Meetings Act, a public body engaged in a “legislative function” must meet in open session. §§10-502(f) and 10-505. The Act assumes that adopting legislation involves a deliberative process. Generally, this entire process must be carried out in an open session. *See, e.g.,* Compliance Board Opinion 93-6, (May 18, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 35. Normally, this process would include the development and adoption of legislative findings, should any be thought appropriate for the particular legislation. The Act recognizes exceptions, however, under which a public body may meet in closed session, subject to the Act’s procedural requirements. One such exception allows a public body to meet in closed session to “consult with staff ... about pending or potential litigation.” §10-508(a)(8). Of course, when meeting in closed session, the public body must limit its discussion to topics within the statutory exception. §10-508(b). *See* Office of the Attorney General, *Open Meetings Act Manual* 26 (4th ed. 2000).

In interpreting the litigation exception, we give effect to the construction required by the General Assembly: “The exceptions ... shall be strictly construed in favor of open meetings” §10-508(c). As we have previously indicated, the discussion in a meeting closed in reliance on §10-508(a)(8) must directly relate to pending or potential litigation; the exception may not be used as a pretext to deal separately in a closed session with an underlying policy issue. *See* Compliance Board Opinion 94-1 (March 22, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 56, 60.

Sometimes, this distinction can readily be drawn. In Compliance Board Opinion 94-1, we reviewed a meeting of the New Carrollton City Council closed under §10-508(a)(8). The meeting concerned a day care center operated by a lessee of the City in the former city hall. The lessee had received a notice from Prince George’s County that operation of the day care center in an area zoned for one-family detached residential use constituted a zoning violation, absent a special exception. There was a dispute between the lessee and the City concerning the City’s obligation to assist in the resolution of this matter and a potential of

litigation. We recognized that consideration of settlement options to avert potential litigation was a legitimate basis for invoking the litigation exception. However, the City Council's discussion was not limited to settlement options; the discussion included the need for the day care center and consideration of an alternative site for the facility. The crux of our opinion was that the policy issue concerning day care was distinct from, and could be discussed separately from, the potential litigation. Because the policy issue could be discussed separately, the narrow construction to be given the litigation exception required that the policy discussion in fact be separate, and open to the public.

At other times, however, policy and litigation issues become inextricably entwined. For example, suppose that a legislative enactment has been challenged in court, and the plaintiffs indicate a willingness to settle the case if the law were amended in certain respects. Surely, the public body's discussion of the settlement proposal would involve both litigation strategy questions (*e.g.*, the likelihood of ultimate success if the settlement proposal were rejected) and policy matters (*e.g.*, the policy goals that might not be achieved if the settlement proposal were accepted). In this hypothetical, the components of the discussion would be interrelated and could not readily be separated.

In our opinion, the litigation exception, fairly and narrowly construed, allows for closed discussion in situations like the latter. The exception is intended not only to preserve the attorney-client and work-product privileges but also to allow public bodies to discuss the strengths and weaknesses of their case and their options for dealing with potential or pending litigation. That an option involves changes in the law does not negate the exception, so long as the subject of the discussion remains the litigation, rather than policy issues in and of themselves, separate from the litigation.

In the situation before us, the Annapolis City Council clearly had an adequate basis for conducting a closed meeting under §10-508(a)(8). The City Attorney wanted an opportunity to discuss with the Council the City's defense strategy in pending litigation challenging the constitutionality of the City's Drug-Loitering Free Zone ordinance. The timing of the meeting, at least in part, reflected the need to respond to plaintiffs' discovery requests. Furthermore, the City's defense strategy apparently is based in part on the legislative findings in support of the ordinance at issue.

Applying the distinction set forth above, in our view, the Council would have violated the Act had it discussed the merits of the legislative findings during the closed meeting. Based on the description of the closed session in the Council's response, however, we understand that this debate was saved until the public meeting that followed. If, indeed, the legislative findings were discussed solely in the context of the pending litigation, the discussion was permissible in closed

session. The City Attorney and Council were permitted under the litigation exception to discuss in closed session the value of written legislative findings in defending the City in the pending litigation.

To assist in its decisions, the Compliance Board encourages public bodies to provide any relevant information that would help the Board review a complaint. Yet, in a situation involving current litigation, we would not expect a public body to compromise its position by releasing sensitive information to the Board that would be protected by attorney-client privilege.⁷ Relying on the Assistant City Attorney's representations, we conclude that the distinction outlined above concerning the scope of the litigation exception was in fact observed. Any discussion of the legislative findings during the closed meeting apparently was incidental to the discussion concerning the litigation. Based on the information available to us, we find that no violation of the Act occurred.

IV

Conclusion

The Council's discussions during its closed meeting June 6 concerned the City's defense of a City ordinance; the discussion may have included the value of legislative findings in the pending litigation. However, the discussion in closed session apparently did not extend beyond the scope of the litigation exception. Therefore, we find that the Council did not violate the Act in connection with the closed meeting.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb

⁷ In terms of protecting the attorney-client privilege, we do not see a distinction between a meeting closed under §10-508(a)(7) (consulting with counsel to obtain legal advice) or §10-508(a)(8) (the litigation exception) if legal counsel is present, as long as the exception is appropriately applied.